No. 14946

United States
Court of Appeals
for the Ninth Circuit

WILLIAM ALFRED LUCKING,

Appellant,

vs.

OJAI MUTUAL WATER COMPANY, a Corporation, and THE OJAI VALLEY COMPANY, a Corporation,

Appellees.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 65)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the Southern District of California, Central Division

No. 15804-BH

WILLIAM ALFRED LUCKING,

Plaintiff,

vs.

OJAI MUTUAL WATER COMPANY, a Corporation, and THE OJAI VALLEY COMPANY, a Corporation,

Defendants.

COMPLAINT

Action for Accounting, Injunctive Relief, and for Further Relief

Plaintiff complains against defendants on behalf of himself and on behalf of all other stockholders of Ojai Mutual Water Company, a California Corporation, and for cause of action alleges:

I.

That the question which is the subject of this action is one of common and general interest to all of the holders of the capital stock of Defendant Ojai Mutual Water Company, a California corporation, and common questions of law and fact are involved affecting the rights of said stockholders of Ojai Mutual Water Company; that the holders of said capital stock are so numerous as to make it impracticable to bring them all before the Court.

II.

Plaintiff is a citizen of the County of Washtenaw in the [2*] State of Michigan, and is of full age and is the owner of upwards of One Hundred (100) shares of the capital stock of the Ojai Mutual Water Company.

III.

(a) Defendant Ojai Mutual Water Company is a corporation duly organized and existing under the laws of the State of California and was incorporated in May, 1920, for the purpose of owning water and water rights in Ojai and vicinity, in Ventura County, and to deliver water to its stockholders only for their exclusive use upon lands owned by them within certain District boundaries.

A copy of the Articles of Incorporation of said Company is attached hereto as Exhibit "A," reference to which is hereby made.

A copy of a Certificate of Amendment to said Articles of Incorporation, dated July 12, 1935, and filed in the office of the Secretary of State on September 2, 1935, is attached hereto as Exhibit "B," reference to which is hereby made.

(b) Defendant The Ojai Valley Company is a corporation duly organized and existing under the laws of the State of Ohio, having been incorporated therein on or about the 4th day of September, 1922, and said The Ojai Valley Company was duly admitted to transact business within the State of Cali-

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

fornia, and in particular Ventura County, and has for the last twenty (20) years and upwards been the owner of certain valuable residential and agricultural properties in a district lying west of Foothills Road and south of Fairview Road, within the Ojai Valley, and originally comprising a total of approximately five hundred (500) acres; the greater part of this district being known as Arbolada and West Hills tracts; and that, upon information and belief, Defendant The Ojai Valley Company is now wholly-owned by the Trustees of the Edward D. Libbey Estate, and was wholly-owned by said Edward D. Libbey and his immediate family from time of incorporation till said Mr. Libbey's [3] death.

Copies of the Articles of Incorporation and Certificate of Amendment thereof, of said The Ojai Valley Company, are attached hereto, marked Exhibits "C" and "D," respectively, reference to which is hereby made.

(c) The interests and rights forming the subject matter in controversy exceeds, exclusive of interest and costs, the value of Three Thousand Dollars ($3,000.00), namely Twenty Thousand Dollars ($20,000.00) and upwards. This action is not collusive to confer on the Court of the United States Jurisdiction over any action of which it did not otherwise have jurisdiction.

(d) That defendant Ojai Mutual Water Company and defendant The Ojai Valley Company have common directors, and complete voting control of defendant Ojai Mutual Water Company is owned by

defendant The Ojai Valley Company, making useless and of no benefit any demand which plaintiff might make upon defendant The Ojai Valley Company for the relief prayed for herein, particularly in view of the allegations hereinafter contained and for the allegations contained in plaintiff's First Amended Complaint in the action entitled "William Alfred Lucking, Plaintiff, vs. Ojai Mutual Water Company, a Corporation, and The Ojai Valley Company, a corporation, defendants", heretofore-filed in this Court and being No. 13197-T.

IV.

That on or about January 11, 1928, plaintiff purchased on land contract from Florence Scott Libbey, a widow, fifteen acres more or less, lying west of Del Norte Road and north of property owned by defendant The Ojai Valley Company and situated in said Ojai Valley, for the sum of Thirty Thousand Dollars ($30,000.00), and which contract was modified on February 9, 1928, so as to cover 15.988 acres at the same price of Two Thousand Dollars ($2,000.00) per acre, a description of which land is attached hereto, marked Exhibit "E," reference to which is hereby made. [4]

It was a part of said contract of purchase and sale that, upon completion of the payments therein specified, plaintiff should receive thirty-two (32) shares of said defendant Ojai Mutual Water Company's capital stock, as fully paid, and which thirty-two (32) shares were afterwards, upon completion of said contract, issued and delivered to plaintiff by Certificates for said shares.

V.

That on or about September 26, 1930, plaintiff purchased on land contract from Florence Scott Libbey, a widow, 33.322 acres more or less, of land adjoining said first purchased land, as set forth in paragraph IV hereof, for a total purchase price of Twenty-five Thousand Dollars ($25,000.00), payable on or before January 1, 1935, as specified.

It was a condition of said last mentioned contract that seller, upon the execution of the contract and the final payments therein specified, should deliver to plaintiff as buyer "free of charge ninety-nine (99) shares of the capital stock, fully paid, of the Ojai Mutual Water Company."

That on or about the 13th day of November, 1940, plaintiff completed said payments of $25,000.00 and received a grant deed from defendant, The Ojai Valley Company, grantee of said vendor and seller, Florence Scott Libbey, of said 33.322 acres, which was duly recorded on September 29, 1942, in Volume 661 of Official Records, page 373 of Ventura County, and at the same time there was delivered to plaintiff Certificate No. 112, dated September 26, 1930, for said 99 shares of the capital stock of said defendant, Ojai Mutual Water Company. A description of said land is attached hereto and marked Exhibit "F," reference to which is hereby made.

VI.

That at the time of making the aforesaid purchases plaintiff had no knowledge of the contents

of the Articles of Incorporation, [5] Exhibit "A," or of the Amendment thereto, dated July 12, 1935, Exhibit "B."

VII.

That on or about May 21, 1945, plaintiff purchased on land contract from defendant, The Ojai Valley Company, 20.82 acres more or less, bounded by Del Norte and Fairview Roads and Foothills Road in said Ojai Valley, and adjoining said two previous purchases, for the sum of Fifteen Thousand Dollars ($15,000.00), payable before May 1, 1952, which transaction was completed by the making of said payments on or about the 10th day of June, 1950, at which time plaintiff received a Grant Deed from said land and recorded it June 30, 1950, in Book 938, of Official Records, page 369, of Ventura County, California, a description of which land is attached hereto and marked Exhibit "G," reference to which is hereby made.

VIII.

In summary, plaintiff further shows that said first and second transactions were made and entered into at a time prior to July 12, 1935, when said Amendment to the Articles of Incorporation of said defendant Ojai Mutual Water Company was filed, being Exhibit "B."

That said Amendment reduced the requisite number of shares of said Ojai Mutual Water Company which should be assigned or allocated to each one acre of land to be owned by the stockholders of said

Ojai Mutual Water Company, which Amendment thus substituted "One share per acre" for the previous requirement of the original Articles of Incorporation of "four shares per acre" as provided for by Exhibit "A."

That of the stockholders meeting of said defendant Ojai Mutual Water Company at which this Amendment, Exhibit "B," was authorized, plaintiff received no notice of said intended Amendment to said Articles of Incorporation as required by law; and [6] upon information, no such notice of said intended Amendment was given as required by law.

IX.

Said defendant, Ojai Mutual Water Company's original Articles of Incorporation, being said Exhibit "A," expressly provides and requires that:

"This company is not authorized to engage in the business of selling, dealing in or distributing said or any water for profit, or for compensation, or as a public service corporation, and none of its waters shall ever be for sale, rental or distribution, and for the delivery of said water to them by said company said stockholders shall pay only such an amount as may be sufficient to pay the cost of management, maintenance and operating of the Company and for the delivery of said water to them.

"The company shall deliver said water fairly, impartially and equitably among and to its qualified stockholders desiring said water, so long as they shall observe the rules and regulations defined in the

Bylaws of the Company and prescribed by the board of directors for the use and delivery of said water, and said company is hereby authorized and empowered to prescribe by appropriate bylaws, all needful rules and regulations for the fair and equitable delivery of said water."

X.

The original Bylaws of said defendant Ojai Mutual Water Company from 1920 until 1935 at least, provide and require, among other matters and things, as follows:

"Article II.

"Board of Directors

"Section 1: Number.

"The corporate powers, business and property of the corporation shall be exercised, conducted and controlled by a board of directors consisting of three persons, or such other increased or decreased number as may be hereafter provided for.

* * *

"Article III.

"Power of Directors

"The directors shall have power:

"1st. To call special meetings of the stockholders when they deem it necessary. And they shall call a meeting at any time, upon the written request of stockholders holding [7] one-fourth of all the capital stock.

"2nd. To appoint and remove, at pleasure, all officers, agents and employees of the corporation, prescribe their duties, fix their compensation, and require from them security for faithful service.

"3rd. To conduct, manage and control the affairs and business of the corporation, and to make rules and regulations, not inconsistent with the laws of the State of California, or the Bylaws of the corporation, for the guidance of the officers and management of the affairs of the corporation.

* * *

"Article X.

"Voting

"At all corporate meetings each stockholder, either in person or by proxy, shall be entitled to as many votes as he owns shares of stock, in the manner required by the Civil Code. Such proxy shall be in writing, and filed with the Secretary.

* * *

"Article XIV.

"Concerning Waters of the Company,
Their Management, Delivery and Use

"(A)

"This company was incorporated, as shown by its articles of incorporation, for the following purposes:

"To acquire, hold, manage and control water and water rights and water bearing lands in the vicinity of Ojai, in Ventura County, California, to-

gether with such personal and other real property, easements and appurtenances as may be necessary or convenient to carry out the purposes and objects of the company, and to deliver said water to its stockholders only, for their exclusive use upon lands owned by them or in their lawful possession, situate in Ventura County, California, lying within the exterior boundaries of the following described property:

* * *

"Provided that any stockholder desiring to use and using said water shall be the owner of at least one share of the capital stock of the company for each one-quarter acre of land or fraction thereof, to which said water is to be delivered for use thereon, situated within the exterior limits of the above-described property, and that such land to which said water is to be delivered for use thereon shall first have been designated and listed by the company in such manner as the bylaws of the company may determine. Mere ownership of stock in said company or of land situated with the above-described limits shall not entitle a stockholder to any water whatever, unless he and his land shall be otherwise eligible. [8]

"This company is not authorized to engage in the business of selling, dealing in or distributing said or any water for profit, or for compensation, or as a public service corporation, and none of its waters shall ever be for sale, rental or distribution, and for the delivery of said water to them by said company said stockholders shall pay only such an amount as

may be sufficient to pay the cost of management, maintenance and operation of the company and for the delivery of said water to them.

"The company shall deliver said water fairly, impartially and equitably among and to its qualified stockholders desiring said water, so long as they shall observe the rules and regulations defined in the bylaws of the company and prescribed by the board of directors for the use and delivery of said water, and said company is hereby authorized and empowered to prescribe, by appropriate bylaws, all needful rules and regulations for the fair and equitable delivery of said water.

"Each of the above provisions of the articles of incorporation is expressly adopted and made a part of these bylaws, and each and every person now a stockholder of this corporation or to hereafter become a stockholder therein, expressly agrees by the signing of these bylaws to be bound by the provisions contained in said articles of incorporation and by any and all bylaws as contained herein or to be hereafter adopted by the company, and by any rule and regulation of said company passed and adopted by its board of directors for the management thereof and for carrying out the purposes for which said corporation was incorporated.

"(B)

"Pursuant to authorization provided for in the articles of incorporation of this company, these bylaws do now determine that any person desiring to use or using any of the waters of this company

shall be the owner of at least one share of its capital stock for each one-quarter acre of land or fraction thereof, to which water is to be delivered for use thereon, which land shall be situated within the exterior limits of the property described in the articles of incorporation and hereinbefore in these bylaws referred to, and authority is now by these bylaws expressly conferred upon the board of directors of the company to pass and adopt from time to time, by appropriate resolution which shall receive the affirmative vote of two-thirds of the entire board of directors, a schedule or schedules designating and listing such of said lands as are described in the articles of incorporation as the board of directors may deem susceptible by the company and desirable to have admitted to the delivery system of the company, such resolution, when passed and adopted, to be entered at length in the minute book of the company and to show the name of the person or corporation owning or in the lawful occupation of said land to describe the same with sufficient certainty so as to cause said property to be readily identified, and to state the number of shares of stock which the owner thereof shall possess in order to entitle said land to water;

"Provided, However, that before said resolution this designating and listing said lands shall become effective in favor of any person or in favor of any land, such person who [9] is by said resolution designated as the owner thereof, shall have first become the owner of the requisite number of shares of the stock of this company, as indicated in said

resolution, and shall have signed these bylaws and have agreed to be bound by everything contained in the articles of incorporation of the company and in these bylaws, as well as any other bylaws to be hereafter by the company from time to time or at any time adopted.

* * *

"(E)

"The board of directors shall have the power at any time or times hereafter, when it shall appear to them expedient and for the best interests of the company to do so, by resolution passed and adopted at a regular meeting and receiving the approval of two-thirds of the entire board of directors, to make and adopt supplemental schedules, including therein such other lands not already listed as in their judgment can be effectively and advantageously supplied with the waters of the company without interfering with or limiting the supply of water to be furnished to the lands covered by the schedule or schedules in force at that time, and which additional land shall be designated in said supplemental schedule in segregated tracts or parcels.

"The board shall fix and determine in said supplemental schedule the number of shares of stock which each owner of said tract therein mentioned shall hold in order to entitle him and said land to water; provided that the allotment of stock to each of said parcels shall be at the rate of at least one share for each one-quarter acre, or fraction thereof,

* * *

"(G)

"The board of directors shall each year, and prior to the beginning of the season, adopt a schedule of charges to be paid for the delivery of water by it to its stockholders who are qualified to receive the same for use upon land owned by them or in their lawful possession, which charges shall be in such an amount only as shall be necessary to pay the cost of management, maintenance and operation of the company, and for the delivery of the water to the stockholders.

"In determining the amount of said charge, the board of directors is expressly authorized to make the same sufficient to create a fund for renewals and a sinking fund for depreciation, if they shall deem the same advisable.

* * *

"(I)

Whenever the board of directors adopts any schedule or schedules or designates or lists any lands as being reasonably susceptible to irrigation by the company, or fixes or determines the amount of the charges to be made for the delivery of water, or fixes or determines the amount to be paid by the stockholders directly it shall do so by resolution duly passed and adopted, in the manner and at the time as in these bylaws provided for, and shall cause the same to be entered at [10] length in the minute book of the company, which minute book

shall be at all times open to inspection and examination of each of the stockholders of the company."

* * *

XI.

Notwithstanding the plain and unequivocal requirements, stipulations and provisions of said Articles of Incorporation, Exhibit "A" of defendant, Ojai Mutual Water Company, specifying in part, that:

"(a) The Company shall deliver said water fairly, impartially and equitably among and to its qualified stockholders desiring said water * * * and said company is hereby authorized and empowered to prescribe, by appropriate bylaws—all needful rules and regulations for the fair and equitable delivery of said water."

(b) That as purportedly amended, on March 4, 1935, the said Board of Directors of Ojai Mutual Water Company was authorized "to state the number of shares of stock which the owner (of said land) thereof shall possess in order to entitle said land to water" which owner stockholder was further required to

"be the owner of, at least, one share of its capital stock for each quarter acre of land or fraction thereof, to which water is to be delivered for use thereon * * *"

"(c) To adopt a schedule of charges to be paid for the delivery of water by it to its stockholders who are qualified to receive the same for use upon

land owned by them or in their lawful possession, which said charges shall be in such amount only as shall be necessary to pay the cost of management, maintenance and operation of the Company, and for delivery of water to the stockholders."

"In determining the amount of said charge, the board of directors is expressly authorized to make the same sufficient [11] to create a fund for renewals and a sinking fund for depreciations, if they shall deem the same advisable." Nevertheless, defendant, Ojai Valley Company, and its officers and directors have, since the year 1935, when it, by its said unlawful and illegal control, so gained over the property, assets and business and affairs of defendant, Ojai Mutual Water Company, as aforesaid, procured and had adopted said purported amendment to its Articles of Incorporation and bylaws, permitting delivery of water to a stockholder of not less than one share to the acre—

thus permitting said defendant Ojai Valley Company to sell all its remaining unsold lands within its original 600 acre area—

to be furnished with said Ojai Mutual Water Company's water—by selling or giving with each acre sold "not less than one share" of said Water Company's stock—and thereby, by means of said scheme or device, permitting said Ojai Valley Company to transfer only one share of said Water Company for each acre sold by it, whereas prior to said

amendment, it was required to transfer not less than four of said shares for each acre sold by it,

thereby permitting it to retain over 1200 shares of said Water Company's capital stock—constituting a clear majority of the total 2003 shares outstanding—thus giving said Ojai Valley Company absolute control of said Water Company, and consequently of a large part of the value and worth of the thirty or more Home Owner Stockholders' residences in said 600 acre area.

when said Ojai Valley Company itself has no remaining property susceptible to use of said Water Company's water, and therefore no legitimate use for or purpose in holding said majority of shares of stock.

And further, the formal requirements as to eligibility of water users, as above set forth, have never been observed by [12] said Water Company.

XII.

Therefore, said Ojai Valley Company and its officers and directors—did

by the arbitrary and unlawful and unreasonable and inequitable act, devise and scheme of, in March, 1935, so amending the said Water Company's Articles of Incorporation and Bylaws—

enable itself to sell all its land assets susceptible to the use of said Water Company's Water—and

thereafter retain actual control of said Company's Water Facilities—which control, by about 1300 of

said control shares (out of a total of 2003 shares) said defendant Ojai Valley Company did in about the year 1947 actually offer to sell to this plaintiff for a sum of upwards of $100,000.00.

XIII.

In the years of 1936 and up to November, 1946, said defendant Ojai Valley Company owned a valuable Country Club and Golf Course Property in Ojai Valley of about 200 acres, and which said Golf Club property had, during said period of upwards of eleven years, actually used a total of upwards of 33,323,000 cubic feet of said Water Companys' water—for which water said Ojai Valley Company only paid a total of $33,323.00 or at the average rate of ten (10) cents per one hundred cubic feet.

On the contrary, during said eleven-year period, an additional 37,607,000 cubic feet of said Water Company's water was used by the individual Home Owners (who had previously purchased property from said Ojai Valley Company) on their respective Home Properties—and who paid therefor a total of about $71,660.00—at an actual average rate of about nineteen (19) cents per one hundred cubic feet.

This Water Company transaction over this eleven year period, [13] of furnishing said 33,323,000 cubic feet of said water, at said average cost or charge of ten cents per one hundred cubic feet—for use on said Ojai Golf Club property,

was accomplished and brought about by the sole action of said owner, Ojai Valley Company, and through its said control of said Water Company, as aforesaid, and

by its Board of Directors, consisting of C. J. Wilcox of Toledo and Rawson Harmon of Ojai Valley—who constituted a majority of the Board of Directors of said Ojai Valley Company, and by said control shares in said Water Company were thus enabled to elect themselves from year to year from said 1936 to said 1947—as a majority of the Board of Directors of said Water Company—and thus to fix and set said very favorable water rates for said Ojai Country Club—at least $30,000 in total more favorable, and less than the same number of cubic feet of water would have been charged said Home Owner stockholders for use of said Water Company's water in their homes and Home properties—during said eleven year period.

XIV.

In November, 1946, said defendant Ojai Valley Company sold and transferred said Ojai Golf Club property to the purchasers thereof, namely, Ojai Hotel Company, a California corporation, and then transferred, out of its then total of about 1500 shares in said Water Company, a total of ninety-nine shares to said purchaser,

which ninety-nine shares is the total number of said Water Company's total outstanding 2003 shares now owned by said Ojai Hotel Company,

Plaintiff will offer in evidence a list of the present Water Company stockholders, and their respective shareholdings—from which it will appear that the present record stockholders are— [14]

(1) Ojai Valley Company, 1400 shares;

(2) William Alfred Lucking, 151 shares;

(3) Ojai Hotel Company, 99 shares;

(4) Miscellaneous 352 shares of individual Home Owner Stockholders holding the balance of said 2003 shares outstanding.

XV.

Since said purchase in November, 1946, of said 200 acres, more or less, of Golf Club Property—said Purchaser, Ojai Hotel Company, has used to December 31, 1952, a total of 24,108,000 cubic feet of said Mutual Water Company's water at a Total Cost of $30,534.00 at an average charge of $0.127 per one hundred cubic feet, whereas said Home Owners stockholders have used a total of 31,339,000 cubic feet at a total cost of $58,204.00 or an average of $0.187 per one hundred cubic feet.

XVI.

Therefore, said Ojai Valley Company's said use of said total of 33,323,000 cubic feet on its said Golf Club Property from 1935 up to its sale thereof in 1946, to said Ojai Hotel Company, and

of said 24,108,000 cubic feet thereafter, by said purchaser, Ojai Hotel Company, at an average

under-charge of eight to ten cents per one hundred cubic feet—or a total of upwards of $45,000.00 less than a Total based upon the rates charged all other stockholder-users of said Water Company's water, operates as a fraudulent over-reaching of said Water Company and its stockholders, and said Ojai Valley Company should account for said Total of $45,000.00 to said Water Company and its stockholders.

XVII.

That said amendment of March 4, 1935, was and is void and the Amendment of the Bylaws in accordance therewith is void as [15] being unreasonable and inequitable and a fraudulent device to retain control of the Water Company by said Ojai Valley Company, after it had sold all its lands susceptible to water—and is now, in substance a mere fraudulent attempt to hold control, by retaining a majority of shares of said Mutual Water Company, although said Ojai Valley Company owns not to exceed 100 acres of unsold land susceptible to use of said water whatsoever.

XVIII.

Upon plaintiffs' information and belief, (a) that since this Plaintiff filed its pending complaint in this Court against these two defendants, in File No. 13197-T, said Ojai Hotel Company has procured from said The Ojai Valley Company, by the terms of a secret transaction unknown to plaintiff, an option to purchase or acquire an additional 500

shares of said balance of 1400 shares of said Water Company—with the purpose and intent of assisting Ojai Valley Company and its present officers to maintain its stock control over said Water Company—and in the future furnish large quantities of said Water Company's water to said Ojai Hotel Company at inequitable and inadequate prices and rates, much less than the rates charged all other stockholders of said Water Company, and

(b) During said period said Ojai Hotel Company placed said Rawson Harmon on its Board of Directors (he being at all times mentioned herein a member of the Board of Directors of said defendant, Ojai Mutual Water Company) for the purpose, (and so intending) that said Rawson Harmon be able to and actually carry out the aforesaid purposes and objects set forth in subparagraph (a) supra—

XIX.

In the year 1950, said Water Company's water levels in its two wells were dangerously low—being at a static average in the summer and fall months of 1950 and 1951, down to a level [16] of 175 to 240 feet below pump levels, and unsafe for said stockholder Home Owners.

That in the years of 1949 and 1950 defendant Water Company, while under the control of defendant Ojai Valley Company, permitted said Ojai Hotel Company to use over 8,000,000 cubic feet on said Hotel Company's Golf Course—and while water

levels in Ojai Valley generally were dangerously low.

That in 1951 said Ojai Valley Company became alarmed over the acute water shortage existing and caused said Water Company to sink a new well at a cost of $12,000.00—which sum said Water Company borrowed and now owes.

XX.

That the requirement of the Water Company's Articles of Incorporation and Bylaws that said Company "shall deliver said water fairly, impartially and equitably among and to its qualified stockholders," is and has been flagrantly violated by Ojai Valley Company in the years of 1936 to 1953, by its said control of said Water Company, and by it requiring said Water Company to deliver to said Ojai Country Club property about 60,000,000 cubic feet of water at a Total Rate or Revenue cost of more than $45,000.00 less than it was delivering a similar amount of water to the Home Owner stockholders of said Water Company, and for which said total savings to said Ojai Valley Company, of over $45,000.00, the said Ojai Valley Company should account to the other Home Owner Stockholders of said Water Company, and to this Plaintiff as their class action representative.

XXI.

It is therefore necessary to show the foregoing facts, circumstances, actions and doings of said Ojai Mutual Water Company and said Ojai Hotel Company in this Complaint, and to this Honorable

Court, in order that this Court may order or [17] decree, if necessary, that the purchaser of said Country Club property, namely, Ojai Hotel Company, which has received in the years of 1947 to 1952, inclusive, over 24,000,000 cubic feet of water at a savings of at least $20,000.00 under the total price of water paid by the said Home Owner Stockholders—for an equal amount of water in those years,

be made a party herein and ordered to pay over to the said Ojai Mutual Water Company said $20,000.00, and

the same to belong to the stockholders of said Water Company as constituted after final judgment of this Court in this cause, if the said bringing into this cause of said Ojai Hotel Company is necessary for the full and complete protection of all the rights and interests of said Water Company and its stockholders and of this plaintiff.

XXII.

That on April 27, 1951, the Directors of said Water Company, namely, C. J. Wilcox, Rawson B. Harmon and Fred C. Embshoff, held a meeting of said Water Company's Board of Directors and after said Water Company had delivered to said Ojai Hotel Company in the years of 1947, 1948, 1949 and 1950, over 15,000,000 cubic feet of water for its golf links,

that said Board of Directors authorized if it was necessary, the construction of a new well to cost not more than $15,000.00.

XXIII.

In March, 1951, said Board of Directors held a special meeting and passed the following resolution, namely:

"The purpose of the meeting was to discuss the revamping of water rates, because of the fact that the Company's operation during the previous year was at a loss, due to shortage of water and to the higher cost of operation.

"The following rates were approved, to be effective with the April 15, 1951, billing of water bills. It is estimated that these rates will take care of ordinary expenses including depreciation. [18]

Rates:

"First 1000 cu. ft. at .25c per 100 cu. ft.

"Next 4000 cu. ft. at .20c per 100 cu. ft.

"Over 5000 cu. ft. at .17c per 100 cut. ft.

"No changes are made in the current minimum charges for the various sizes of meters.

"There being no further business before said meeting, the same adjourned.

"Approved

"Rawson B. Harmon,
"Vice President.

"Attest:
"Fred C. Embshoff,
"Secretary."

XXIV.

This was done, notwithstanding said Water Company, with a 1943 capital deficit of $6,146.32 had a surplus thereafter, as follows:

(1) On December 31, 1944—$490.90
(2) On December 31, 1945—$4912.25
(3) On December 31, 1946—$7476.33
(4) On December 31, 1947—$11,166.32
(5) On December 31, 1948—$17,752.00

XXV.

Plaintiff shows further that the Books of said Water Company show that:

(a) On December 31, 1941, there was neither a surplus nor a deficit—but

(b) On December 31, 1942—there was a deficit of $26,240.89—and

(c) On December 31, 1943—a deficit of $6146.00

(d) But on December 31, 1944, as above stated there was a surplus of $490.90

While there is shown on the books:

(e) On December 31, 1934, a surplus of $18,225.00

(f) On December 31, 1935, a surplus of [19] $17,425.00

(g) On December 31, 1936, a surplus of $14,-425.00

(h) On December 31, 1937, a surplus of $7,-925.00

(i) On December 31, 1938, a surplus of $4,-125.00

(j) On December 31, 1939, a surplus of $2,-000.00

(k) On December 31, 1940—no surplus or deficit.

Plaintiff asks this Court to require an explanation of this kind of bookkeeping which shows a surplus on December 31, 1934, of $18,225.00 and a decline to the December 31, 1942, deficit of $26,240.89, and a "so-called" recovery in two years to a surplus of $4,912.25 on December 31, 1945, and now as of December 31, 1952, a considerable and substantial surplus.

XXVI.

On the death of Florence Scott Libbey, about the year 1934, she left—

(a) 4656 Preferred shares of defendant, Ojai Valley Company, par value $100 each and which were appraised in the Lucas County, Ohio, Probate Court in her Estate at $46,500.00, and

(b) 1500 shares of Common stock of Ojai Valley Company, appraised at "nothing," and

(c) 457 shares of common stock of Ojai Mutual Water Company, defendant herein, par value $50.00 and appraised at $38.50 a share—$17,594.50.

XXVII.

On March 7, 1938, a transfer by Florence S. Libbey, to the Ojai Valley Company of 326 shares of

Ojai Water Company was approved by directors of the Water Company.

XXVIII.

On December 31, 1951, the annual report of the defendant, Ojai Valley Company showed that its entire outstanding preferred shares were carried on its books as worthless. [20]

XXIX.

On March 2, 1936, one year after said Articles of Incorporation were purportedly amended to permit "not less than one Water Company share per acre"—a Resolution of the Water Company's Board of Directors required and asked—

"Manager to survey lands lying within the exterior boundaries of the territory which may be served by the corporation and not now served, and to ascertain and report to this Board, the land and the owners thereof who might be eligible for service by the Company."

XXX.

The Record of the Minutes of the Directors' meetings of the Water Company, show the following:

(a) The records show that on April 21, 1921, 800 shares of 1996 shares were cancelled, leaving Mr. Libbey 1196 shares issued and the total capital stock was thus corrected to $65,000.00, all on page 27 of the records.

(b) On page 31, the capital stock outstanding

is stated as $68,950.00 as per the statement of December 31, 1921.

(c) At the annual stockholders meeting of March 7, 1927, it is recited that the shares are owned as follows: Ojai Valley Company—900 shares; Florence Libbey—457 shares—total capital stock $72,400.00—on December 31, 1926.

(d) At the annual meeting of March 5, 1928, it is recited that the Ojai Valley Company owns 1430 shares, Florence Libbey 425 shares and that the capital stock is a total of $100,150.00 as of December 31, 1927.

There appears no authority by resolution of its Board of Directors for these changes in the stock totals.

XXXI.

In March, 1951—said Ojai Mutual Water Company's Board of Directors ordered that said Water Rate of ten cents per 100 cubic feet was inadequate and should be increased to seventeen cents per 100 cubic feet. [21]

XXXII.

As a Summary of the preceding Allegations for the convenience of this Honorable Court—Plaintiff respectfully submits the following statements:

(a) In the years of 1936 to 1946, inclusive, defendant, The Ojai Valley Company, owned and operated the property known as the Ojai Valley Country Club of about 200 acres.

occupied and used as an eighteen hole golf course and a suitable clubhouse, at which over-night guests could be accommodated.

(b) In November, 1946, said defendant, Ojai Valley Company, sold said Country Club property for a sum of upwards of $100,000.00 to the Ojai Hotel Company, which has actually operated and carried on said property as golf club and hotel, since said purchase.

(c) During said period of 1936 to 1946, inclusive, while said defendant The Ojai Valley Company owned and was in control of said Country Club property, and also controlled defendant, Ojai Mutual Water Company and always without the knowledge of this plaintiff—

said defendant, Ojai Valley Company, ordered and compelled said Ojai Mutual Water Company to deliver upwards of 33,000,000 cubic feet of its water to said Country Club property at a rate of ten cents per 100 cubic feet,

although the rates charged all other Ojai Mutual Water Company users and stockholders were nearly double said ten cents per 100 cubic feet rate so charged for said Country Club property to said defendant, Ojai Valley Company.

(d) By this arrangement and schedule of rates so put in force and kept in force by said defendant, The Ojai Valley Company in said years of 1936 to 1946, inclusive, it was enabled—

(1) to under-charge itself almost ten cents per 100 [22] cubic feet, on said 33,000,000 cubic feet of water, so furnished its said Country Club Property —until it sold said property in November, 1946, to said Ojai Hotel Company, and

(2) to so under-charge said Hotel Company nearly ten cents per 100 cubic feet on the upwards of 15,000,000 cubic feet of water it, said The Ojai Valley Company, so sold said Ojai Hotel Company in the years of 1947, 1948, 1949 and 1950, while it was in control of said defendant Water Company.

(e) Thus, on a total of water in said fifteen year period of 1936 to 1950—so furnished said Country Club property, as aforesaid, under said control so exercised by said defendant, The Ojai Valley Company—

a total of about 50,000,000 cubic feet of said Ojai Mutual Water Company's water was so furnished said Club property for a total of approximately $64,000.00, and thus resulted in said unjust, inequitable and unreasonable discrimination in said water rates—of at least eight to ten cents per 100 cubic feet under-charge for said totals of water so sold and furnished to said Golf Club—and for which said under-charges of at least $45,000.00, said Ojai Valley Company should account to said defendant Ojai Mutual Water Company and to its stockholders, now represented in this cause by this plaintiff.

(f) During the four years of 1947 to 1950, inclusive, while said Golf Club property was owned

and operated by said purchaser, Ojai Hotel Company, it was likewise favored in water rates—by the said stock control of said Water Company by said Ojai Valley Company—and in those four years a total of 17,490,000 cubic feet of water was thus delivered to and used by said Ojai Hotel Company —at a rate of approximately ten cents per 100 cubic feet—making a total charge therefor of $19,081.00—

whereas a total of 22,200,000 cubic feet was delivered by said Water Company to its other home owner shareholders and to [23] two or three schools —for a total of $37,568.00—as plaintiff is informed and believes, after which in March, 1951, all rates for all users of said Water Company's water were raised to a minimum of seventeen cents per 100 cubic feet.

XXXIII.

And this plaintiff avers and charges and respectfully submits to this Honorable Court, as follows:

(a) Throughout said period of 1936 to 1950, inclusive, the water charges and rates for said huge Total of 50,000,000 cubic feet of Ojai Mutual Water Company's water, so furnished said Country Club Property—

while under the control of said The Ojai Valley Company—

should have been at least twenty-five cents per 100 cubic feet (under the principles laid down by the Supreme Court of California, in the case of Williard v. Irrigation District, 201 Cal. 726),

and that therefore, said defendant, The Ojai Valley Company should account to and pay to said Ojai Mutual Water Company and its stockholders represented by this plaintiff at least the sum of $75,000.00 with lawful interest thereon until paid, the same being fifteen cents per 100 cubic feet greater than the ten cents per 100 cubic feet actually charged and collected for said water so furnished and delivered in said fifteen years to said Golf Club property by said Water Company, while under the control of said Ojai Valley Company.

(b) That likewise defendant, Ojai Hotel Company, should account to said Ojai Mutual Water Company for the 24,000,000 cubic feet of Ojai Mutual Water Company water received by it from November, 1946, when it purchased said Country Club property from defendant Ojai Valley Company, until January 1, 1953, at a rate and charge of at least twenty-five cents per one hundred [24] cubic feet, or a total of $60,000.00 upon which it has, however, only paid a total of $30,537.00 to date—

unless said defendant, Ojai Valley Company so accounts therefor, and plaintiff asks that said

(c) Ojai Hotel Company, a California Corporation, be made a party defendant herein if it is (1) necessary for said Water Company and its stockholders to receive and be paid said balance of $29,500.00, or (2) if it is necessary that adequate protection be afforded the Home Owner stockholders in the future for the possible injury resulting to them

in dry years, due as in 1950 or 1951 to excessive use of water on the said Golf Club property, if that be the fact.

Wherefore, plaintiff prays judgment:

1. That the defendant Ojai Mutual Water Company be forever enjoined and restrained from practicing any price discrimination whatsoever in favor of the Ojai Hotel Company or any other person, firm or corporation, in its water rates charged for water supply furnished by defendant Ojai Mutual Water Company.

2. That the defendant The Ojai Valley Company be enjoined and restrained, during the pendency of the above-entitled action and until its final determination, or until the Court shall otherwise order, from selling or in any manner transferring or becoming obligated to transfer any share or shares of stock in Ojai Mutual Water Company to Ojai Hotel Company or to any person, firm or corporation acting for or in behalf of said Ojai Hotel Company, and to make said injunction permanent upon final determination of this action.

3. That defendant, The Ojai Valley Company, be ordered to pay to defendant Ojai Mutual Water Company, the sum of $45,000.00, and such other or further sums that the Court may find due from the defendant, The Ojai Valley Company, to defendant Ojai Mutual Water Company; and for this purpose that a special referee be [25] appointed to inspect the books and records of the defendant, The Ojai

Valley Company and the defendant Ojai Mutual Water Company, and obtain an accounting herein.

4. And for such other and further relief, including costs herein expended, as the Court may deem just and proper and for the full protection of plaintiff and the other shareholders of Ojai Mutual Water Company.

Dated: August 12th, 1953.

/s/ WILLIAM ALFRED LUCKING

State of Michigan,
County of Wayne—ss.

William Alfred Lucking, being sworn says: That he is plaintiff in the above-entitled action; that he has read the foregoing Complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters that he believes it to be true.

/s/ WILLIAM ALFRED LUCKING

Subscribed and sworn to before me this 12th day of August, 1953.

[Seal] /s/ MARIE TRITLE,
Notary Public in and for Said Wayne County and State of Michigan.

My commission expires July 26, 1957. [26]

[Exhibits A to G, inclusive, attached to the foregoing Complaint are not reproduced in this printed record as they are identical to Exhibits A to G attached to the Complaint in Cause No. 14945. Pages 26 to 54.]

[Endorsed]: Filed August 19, 1953.

[Title of District Court and Cause.]

ANSWER

Come now the defendants, Ojai Mutual Water Company, a corporation, and The Ojai Valley Company, a corporation, and each for itself and not for the other defendant, and answer the complaint of the plaintiff and admit, deny and allege as follows:

I.

In answer to Paragraph I thereof deny all and singular, generally and specifically, each and every allegation in said paragraph contained.

II.

In answer to Paragraph III thereof these answering defendants deny that defendant, The Ojai Valley Company was originally the owner of approximately five hundred acres of land referred to in said Paragraph III and further deny that The Ojai Valley Company is now wholly owned by the trustees of the [52] Edward D. Libbey Estate and further deny that the same was wholly owned by

said Edward D. Libbey and/or his immediate family from the time of incorporation until Mr. Libbey's death.

These answering defendants deny all and singular, generally and specifically, each and every allegation contained in subdivisions (c) and (d) of said Paragraph III contained.

III.

In answer to Paragraph IV thereof these answering defendants deny all and singular, generally and specifically, each and every allegation in said Paragraph IV contained.

IV.

In answer to Paragraph V thereof these answering defendants deny all and singular, generally and specifically, each and every allegation therein contained, except that plaintiff did purchase certain real property from the defendant, The Ojai Valley Company, and that said deed was recorded as alleged in said paragraph and that said certificate referred to in said paragraph was issued to plaintiff.

V.

In answer to Paragraph VI thereof, these answering defendants deny all and singular, generally and specifically, each and every allegation in said paragraph contained.

VI.

In answer to Paragraph VII thereof these answering defendants admit the purchase of said land

by plaintiff and that said deed was recorded on or about the date alleged and set forth in said paragraph.

VII.

In answer to Paragraph VIII thereof these answering defendants deny all and singular, generally and specifically, each and every allegation in said Paragraph VIII contained, except that defendants admit the allegations contained in [53] lines 17 to 28, inclusive, of said paragraph.

VIII.

In answer to Paragraphs IX and X thereof these answering defendants admit the allegations in said paragraphs contained, subject however to any corrections that said defendants may desire to make concerning the accuracy of the allegations respecting the records of defendant, Ojai Mutual Water Company.

IX.

In answer to Paragraph XI thereof these answering defendants admit the allegations contained on lines 9 to 14 of page 10, inclusive; and on lines 21 to 32, page 10, and lines 1 to 3, page 11, inclusive; these answering defendants deny all and singular, generally and specifically, each and all the remaining allegations of said Paragraph XI contained on pages 10, 11 and 12 of said complaint.

X.

These answering defendants deny all and singular, generally and specifically, each and every al-

legation contained in Paragraphs XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX and XXI of said complaint.

XI.

In answer to Paragraph XXII these answering defendants deny all and singular, generally and specifically, each and every allegation therein contained, except that there was a meeting of the Board of Directors held and the said Board was authorized, if necessary, to construct a new well to cost not more than $15,000.00.

XII.

In answer to Paragraphs XXIV, XXV, XXVIII, XXIX, XXX, XXXII and XXXIII these answering defendants deny all and singular, generally and specifically, each and every allegation therein contained. [54]

XIII.

In answer to Paragraph XXVI thereof these answering defendants deny all and singular, generally and specifically, each and every allegation therein contained, except that the shares of stock of Florence Scott Libbey were appraised at $46,500.00, in her estate.

For a Further, Separate and Second Defense and Answer to Plaintiff's Complaint These Answering Defendants Allege as Follows:

I.

That plaintiff's alleged cause of action is barred by the provisions of subdivision (1) of Section 337

of the Code of Civil Procedure of the State of California.

For a Further, Separate and Third Defense and Answer to Plaintiff's Complaint These Answering defendants Allege as Follows:

I.

That plaintiff's alleged cause of action is barred by the provisions of subdivision (1) of Section 339 of the Code of Civil Procedure of the State of California.

For a Further, Separate and Fourth Defense and Answer to Plaintiff's Complaint These Answering Defendants Allege as Follows:

I.

That plaintiff's alleged cause of action is barred by the provisions of subdivision (1) of Section 340 of the Code of Civil Procedure of the State of California.

For a Further, Separate and Fifth Defense and Answer to Plaintiff's Complaint These Answering Defendants Allege as Follows:

I.

That plaintiff's alleged cause of action is barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

For a Further, Separate and Sixth Defense and Answer to Plaintiff's Complaint These Answering Defendants Allege as Follows: [55]

I.

That ever since on or about the month of February, 1928, the plaintiff has been the owner of certain shares of stock of defendant, Ojai Mutual Water Company, a corporation; that said plaintiff had transferred to him and took title to 32 shares of stock of said defendant, Ojai Mutual Water Company on or about February 23, 1928; that said plaintiff purchased said shares from one, Mrs. Florence Scott Libbey, individually, and not from either of said defendants; that on or about the 26th day of September, 1930, the said plaintiff acquired title to, and purchased 99 shares of the stock of Ojai Mutual Water Company, a corporation, from said Florence Scott Libbey, individually, and not from either of said defendants; that on or about the 12th day of June, 1945, the said plaintiff acquired title to 20 shares of the stock of Ojai Mutual Water Company, a corporation, by purchasing and acquiring the same from the defendant, The Ojai Valley Company, a corporation.

II.

That the purchase of said 32 shares of stock of Ojai Mutual Water Company above referred to and the purchase of said 99 shares of stock of Ojai Mutual Water Company above referred to, were transferred, sold and issued to said plaintiff by

reason of the fact that plaintiff had purchased from said Florence Scott Libbey individually, 15.988 acres of land and 33.32 acres of land, all of which said land was at the time of the purchase of the same by said plaintiff, included within the exterior boundaries of the lands described in the Articles of Incorporation of Ojai Mutual Water Company, a corporation. That the total acreage of said lands so purchased by the said plaintiff in connection with the said stock in Ojai Mutual Water Company, acquired by plaintiff as hereinabove set forth, contained approximately 49.208 acres of land, more or less, [56] and plaintiff acquired, by reason of the purchase of said lands as hereinabove alleged, a total of only 131 shares of the capital stock of the defendant, Ojai Mutual Water Company, a corporation, and the said plaintiff has at all times since acquiring said shares of stock in Ojai Mutual Water Company, a corporation, received water service from defendant, Ojai Mutual Water Company, a corporation, to said lands so purchased by plaintiff as hereinabove alleged, under and by virtue of the bylaws, rules and regulations relating to the furnishing and supplying of water by Ojai Mutual Water Company, a corporation, to plaintiff and other owners of shares of stock in said mutual water company.

III.

That plaintiff further purchased and acquired 20 shares of stock of Ojai Mutual Water Company, a corporation, on or about the 12th day of June, 1945, from defendant, The Ojai Valley Company, a cor-

poration; that said shares of stock referred to in this paragraph, so acquired by plaintiff, were sold and issued to plaintiff by the defendant, The Ojai Valley Company by reason of the purchase by plaintiff of 20.92 acres of land lying within the exterior boundaries of the lands described and set forth in the Articles of Incorporation of defendant, Ojai Mutual Water Company, a corporation, and to which the owner thereof would be entitled to receive water service from said defendant, Ojai Mutual Water Company, a corporation, in accordance with its Articles of Incorporation, bylaws, rules and regulations pertaining to the furnishing by it of water to qualified land owners owning lands within the exterior boundaries of the lands described in the Articles of Incorporation of Ojai Mutual Water Company.

That the issuance of said 20 shares of stock to said plaintiff was transferred to, paid for, and accepted by plaintiff, from defendant The Ojai Valley Company, on a basis [57] of one share of stock per acre of land so purchased and acquired by plaintiff within the exterior boundaries of the land described in the Articles of Incorporation of defendant, Ojai Mutual Water Company, and to which plaintiff would be entitled to receive water from it in pursuance of its Articles of Incorporation, bylaws and rules and regulations respecting the furnishing of water and the said plaintiff accepted said shares of stock on a basis of one share per acre as herein alleged with full knowledge of

the fact that the articles of incorporation of defendant, Ojai Mutual Water Company, had been amended on the 4th day of March, 1935, providing that any stockholder desiring to use water from the Ojai Mutual Water Company shall be the owner of at least one share of the capital stock of said Ojai Mutual Water Company for each acre of land or fraction thereof to which said water was to be delivered or used thereon furnished within the exterior limits of the real property described and set forth in the original articles of incorporation of the defendant, Ojai Mutual Water Company, a corporation.

IV.

That at the time of the amendment to the articles of incorporation of defendant, Ojai Mutual Water Company, the plaintiff was the owner of approximately 49 acres of land, more or less and of 131 shares of the capital stock of defendant, Ojai Mutual Water Company and at the time, and for several years prior to said amendment of said articles of incorporation, had been receiving water service from defendant, Ojai Mutual Water Company in accordance with its articles of incorporation, by-laws and rules and regulations pertaining to the delivery of water to holders of its stock and subsequent to said amendment of said articles of incorporation the said plaintiff has continued to receive water from defendant, Ojai Mutual Water Company, a corporation, for said 49 acres of land, more or less, up until [58] the present time.

V.

That the plaintiff, ever since on or about the 12th day of June, 1945, by reason of the purchase of said 20.82 acres of land as hereinabove alleged, has been receiving and accepting water service from said defendant, Ojai Mutual Water Company, a corporation, in accordance with said amendment to its said articles of incorporation, and without protest, hindrance or objection on the part of plaintiff and in accordance with the rates and charges fixed for said water service by the Board of Directors of said water company and in accordance with its bylaws and rules and regulations pertaining to the sale and furnishing of water to its stockholders and at the prices, charges and rates fixed by said Board of Directors in accordance with its said articles of incorporation, bylaws, rules and regulations pertaining to the sale and furnishing of said water.

VI.

That plaintiff at all times herein mentioned, has acquiesced in, consented to and accepted water service from defendant, Ojai Mutual Water Company, a corporation, in accordance with its original and amended articles of incorporation and in accordance with its bylaws, rules and regulations respecting the furnishing of water by it to its shareholders; that plaintiff herein has at all times known and been aware of the fact that there is contained within the exterior boundaries of the real property described in the original articles of incorporation of defendant, Ojai Mutual Water Company, approx-

imately 2675 acres of land, all of which said land is qualified and entitled to receive water service from Ojai Mutual Water Company, a corporation, under its original and amended articles of incorporation and the bylaws, rules and regulations adopted by defendant, Ojai Mutual Water Company relative to the furnishing of water [59] service to qualified owners of land within said area and at the rates and charges fixed by the Board of Directors of said water company in accordance with its articles of incorporation, bylaws, rules and regulations.

VII.

That plaintiff has at all times herein mentioned known and been aware of the fact that there has been a heavy increase in population of the said area subject to water service above referred to and that from time to time various and divers persons, firms and corporations have purchased land within said area subject to water service and that from time to time said persons, firms and corporations have acquired shares of stock in Ojai Mutual Water Company by virtue of their purchase of land within said area owned or held by defendants, or either of them; that plaintiff, at all times herein mentioned, has known and been aware of the fact that shares of stock of Ojai Mutual Water Company have been sold to and acquired by individuals, firms and corporations owning land within said service area, which said lands were not acquired from defendant, The Ojai Valley Company, or its

grantees, and that said individuals, firms and corporations further acquiring said lands within said service area have been accepting and receiving water service from said defendant, Ojai Mutual Water Company pursuant to the provisions of its original and amended articles of incorporation as herein referred to and set forth and that said individuals, firms and corporations have relied upon the continued existence of said water service so being received by them and in reliance thereon have constructed valuable and extensive improvements, agricultural, commercial, industrial and otherwise, within said service area; that with full knowledge of said facts as in this paragraph alleged plaintiff has never protested, objected to or complained against the doing of any of said acts by the said defendants, or either of them, in [60] the sale of any of said stock of defendant, Ojai Mutual Water Company, or in the furnishing of said water service as herein set forth, or at the rates or at the prices and conditions established from time to time by the Board of Directors of said water company and in accordance with its articles of incorporation, bylaws, rules and regulations, from on or about the 11th day of January, 1928, to on or about the date of the filing of the complaint in this action, to wit: On or about the 19th day of August, 1953, insofar as any objections have ever been made or voiced by plaintiff respecting the rates, prices and charges adopted by the Board of Directors of said water company for the sale of the waters of said company to its stockholders in accordance with the

articles of incorporation, bylaws, rules and regulations of said water company.

VIII.

That furthermore, the said plaintiff at all times herein has known and been aware of the fact that by reason of the progressive and continued growth in population within the service area above referred to, the defendant, Ojai Mutual Water Company has been compelled to and has expended large sums of money from time to time in order to construct, maintain and repair the necessary facilities required by it under its original and amended articles of incorporation in order to furnish said water service to the qualified persons, firms and corporations within said service area, and in so doing has had, from time to time, to fix a schedule of rates and prices for the furnishing and supplying of water in accordance with the needs and necessities of the situation and pursuant to its articles of incorporation, bylaws, rules and regulations; that in so doing the said plaintiff has never at any time objected, protested, or in any way sought to prevent the continued water service within said service area and the expenditures necessary to be made by said [61] defendant, Ojai Mutual Water Company in order to maintain and keep said water service in effect, until the filing of his complaint in this action and until the filing of his complaint in action numbered 13197-T now on file in the above-entitled court; that at all times herein mentioned plaintiff has been aware of the fact, or by the exercise of

reasonable or ordinary diligence could have acquainted himself with the fact, that it was necessary for said original articles of incorporation of said defendant, Ojai Mutual Water Company to be amended as hereinabove alleged, by reason of the continued growth existing within said service area in order that additional consumers of water within said service area could be supplied by said water company with water needed by additional and qualified consumers within said area. That the said articles of incorporation of said Ojai Mutual Water Company were amended for the purpose of enabling it to extend its service and facilities within said service area in order to promote the expansion and growth of the said service area described and set forth in the original articles of incorporation of said water company, all of which has at all times been known to plaintiff and all of which plaintiff never complained of or objected to until the filing of his original complaint in this action, to wit: On or about the 19th day of August, 1953, or until the filing of his complaint in action numbered 13197-T now on file in the above-entitled court.

IX.

That by reason of the foregoing facts and matters hereinabove alleged in defendants' further, separate and sixth defense and answer to plaintiff's complaint, plaintiff has been guilty of laches in asserting any right, claim or interest of any kind or nature that he may now have or claim to have against any or either of said defendants, to pre-

vent them in any way from selling the water of defendant, Ojai Mutual Water Company, [62] pursuant to the rates and schedules which have heretofore been in effect by said water company and which are now in effect by said water company, or that defendant, Valley Company, be enjoined or restrained in any way or manner whatsoever, from selling or in any manner transferring or becoming obligated to transfer, any share or shares of stock in said Ojai Mutual Water Company, to Ojai Hotel Company, or to any other person, firm or corporation whatsoever, or to issue any injunction in said matter of any kind or nature whatsoever as against defendants, or either of them, or that the Ojai Valley Company be ordered to pay to defendant, Ojai Mutual Water Company the sum of $45,000.00, or any other sum or sums, or at all, or that any referee be appointed to inspect the books and records of defendant, The Ojai Valley Company or defendant, Ojai Mutual Water Company, or to obtain any accounting therein.

For a Further, Separate and Seventh Defense and Answer to Plaintiff's Complaint These Answering Defendants Allege as Follows:

I.

These answering defendants repeat and reallege each and every allegation contained in Paragraphs I, II, III, IV, V, VI, VII and VIII of defendants' further, separate and sixth defense and answer to plaintiff's complaint and make them a part of this,

defendants' further, separate and seventh defense and answer to plaintiff's complaint and each and every alleged cause of action therein set forth, as if expressly set out at length herein.

II.

That by reason of the facts and matters aforesaid alleged plaintiff is estopped from claiming or asserting any right on plaintiff's part, or on the part of any shareholder or stockholder of said defendants, as against the said defendants, or either of them, by reason of anything alleged and set forth in plaintiff's [63] alleged cause of action, or for any relief prayed for by plaintiff in the prayer of his alleged cause of action, or otherwise.

For a Further, Separate and Eighth Defense and Answer to Plaintiff's Complaint These Answering Defendants Allege as Follows:

I.

These answering defendants repeat and reallege each and every allegation contained in Paragraphs I, II, III, IV, V, VI, VII and VIII of defendants' further, separate and sixth defense and answer to plaintiff's complaint and make them a part of this, defendants' further, separate and eighth defense and answer to plaintiff's complaint, as if expressly set out at length herein.

II.

That by reason of the facts and matters aforesaid alleged plaintiff has waived any right on his part to

claim or assert any right on his part, or on the part of any stockholder or shareholder of defendants, or either of them, as against the said defendants, or either of them, by reason of anything alleged and set forth in plaintiff's complaint, or for any relief prayed for by plaintiff in the prayer of his complaint, or otherwise.

For a Further, Separate and Ninth Defense and Answer to Plaintiff's Complaint, These Answering Defendants Allege as Follows:

I.

These answering defendants repeat and reallege each and every allegation contained in Paragraphs I, II, III, IV, V, VI, VII and VIII of defendants' further, separate and sixth defense and answer to plaintiff's complaint and make them a part of this, defendants' further, separate and ninth defense and answer to plaintiff's complaint as if expressly set out at length herein. [64]

II.

That by reason of the facts and matters aforesaid alleged plaintiff has acquiesced in and consented to the various acts and things done by these answering defendants as herein alleged and set forth and is now prevented from claiming or asserting any right on his part, or on the part of any shareholder or stockholder of said defendants as against the said defendants, or either of them, by reason of anything alleged and set forth in plaintiff's com-

plaint, or for any relief prayed for by plaintiff in the prayer of his complaint, or otherwise.

Wherefore, these answering defendants demand judgment:

1. That plaintiff take nothing by reason of his complaint;

2. That it be adjudged and decreed that plaintiff's complaint is barred by the provisions of Subdivision 1, of Section 337, Code of Civil Procedure; subdivision 1 of Section 339, Code of Civil Procedure; subdivision 1 of Section 340, Code of Civil Procedure, and Section 343, Code of Civil Procedure;

3. That it be adjudged and decreed that plaintiff has been guilty of laches and is not entitled to any relief prayed for in his complaint;

4. That it be adjudged and decreed that plaintiff is estopped from claiming or asserting any right on plaintiff's part, or on the part of any shareholder or stockholder of said defendants, or either of them, as against the said defendants, or either of them, by reason of anything alleged and set forth in plaintiff's complaint;

5. That is be adjudged and decreed that plaintiff has acquiesced and consented to all of the acts on the part of said defendants, or either of them, complained of by plaintiff, and that he has waived any right to complain of the same as against defendants, or either of them;

6. For defendants' costs of suit incurred herein and [65] for such other and further relief as may seem just and equitable to the Court.

/s/ JAMES C. HOLLINGSWORTH,
Attorney for Defendants.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed February 10, 1954. [66]

[Title of District Court and Cause.]

MINUTES OF THE COURT
MARCH 10, 1954

Hon. Ernest A. Tolin, District Judge.

Proceedings:

Acting on previous order heretofore entered Oct. 19, 1953, herein, the Court Now Orders this case Consolidated for trial with Case No. 13,197-T Civil, and said two consolidated cases are set for trial July 6, 1954, 10 a.m.

It is further ordered that pretrial will be had in this case June 1, 1954, 10 a.m.

Clerk will issue pretrial order.

EDMUND L. SMITH,
Clerk. [68]

In the District Court of the United States for the Southern District of California, Central Division

No. 15804-T

WILLIAM ALFRED LUCKING,

Plaintiff,

vs.

OJAI MUTUAL WATER COMPANY, a Corporation, and THE OJAI VALLEY COMPANY, a Corporation,

Defendants.

JUDGMENT BARRING THE TAKING OF EVIDENCE AND DISMISSAL OF COMPLAINT

The above-entitled cause came on regularly for trial on the 26th day of May, 1955, before the Court sitting without a jury, plaintiff William Alfred Lucking appearing in propria persona and James C. Hollingsworth, Esq., appearing for defendants, and counsel for defendants having moved the Court to bar the taking of evidence in said cause and for dismissal of the complaint upon the ground that the complaint does not state a claim upon which relief can be granted and upon the further ground that the same is not a class action as pleaded,

It is therefore ordered, adjudged and decreed that the said motions of said defendants be and the same are hereby granted and the taking of evidence in said cause is barred and the said cause is hereby dismissed.

Dated this 28th day of July, 1955. [69]

/s/ ERNEST A. TOLIN,
Judge.

State of California,
County of Ventura—ss.

James C. Hollingsworth being duly sworn, deposes and says: That he personally delivered two copies of the attached judgment barring the taking of evidence and dismissal of complaint to William A. Lucking, Jr., on the 3rd day of June, 1955, at 2:30 p.m.; that said William A. Lucking, Jr., stated in substance at said time that he would not approve said Judgment as to form; that in event he decided in the future to so approve the same that he would forward a copy of said Judgment to the Court with his signature endorsed thereon. Further deponent sayeth not.

/s/ JAMES C. HOLLINGSWORTH.

Subscribed and sworn to before me this 3rd day of June, 1955.

[Seal] /s/ DOMINICA STEWART,
Notary Public in and for Said County and State.

My Commission Expires Feb. 9, 1958.

Receipt of copy acknowledged.
Lodged June 15, 1955.
[Endorsed]: Filed July 28, 1955.
Docketed and entered July 28, 1955. [71]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Ojai Mutual Water Company and The Ojai Valley Company, the defendant corporations, and to James C. Hollingsworth, Esq., their attorney:

Notice is hereby given that William Alfred Lucking, the plaintiff above named, for himself and for the other class plaintiffs, hereby appeals to United States Court of Appeals for the Ninth Circuit from the final Judgment Barring the Taking of Evidence and Dismissal of Complaint entered in this action on July 28, 1955.

Dated: August 23, 1955.

WILLIAM ALFRED
LUCKING,
In Pro. Per.

By /s/ WM. A. LUCKING, JR.,
Attorney-In-Fact.

[Endorsed]: Filed August 24, 1955. [72]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT WILLIAM ALFRED LUCKING INTENDS TO RELY ON APPEAL

Appellant Willam Alfred Lucking, for himself and for the other class plaintiffs herein, hereby

makes the following statement of points upon which he intends to rely on the appeal taken in the above-entitled matter:

1. The Court erred in granting defendants' motions, and in its Judgment Barring the Taking of Evidence and Dismissal of Complaint in the above-entitled cause on the ground that the same is not a class action as pleaded, in that the granting of said motions and rendering judgment thereon are contrary to law, contrary to the evidence, and not supported by any evidence.

2. The Court erred in granting defendants' motions, and in its Judgment Barring the Taking of Evidence and Dismissal of Complaint upon the ground that the complaint does not state a claim upon which relief can be granted, in that such judgment is contrary to law and contrary to the facts properly pleaded and adduced at [76] the trial.

3. The Court erred in granting defendants' motions, and in its Judgment Barring the Taking of Evidence and Dismissal of Complaint in the above-entitled cause on the ground that the same is not a class action as pleaded, in that if the action was not a properly pleaded class action, the Court sitting in equity failed to treat as surplusage the allegations pertaining to class actions and failed to render full and complete relief to plaintiff William Alfred Lucking in his individual right, which failure is contrary to law and contrary to the evidence adduced at the trial.

Dated at Detroit, Michigan, this 26th day of October, 1955.

/s/ WILLIAM ALFRED LUCKING,
In Pro Per.

By /s/ WM. A. LUCKING, JR.,
Attorney in Fact.

Receipt of copy acknowledged.

[Endorsed]: Filed October 27, 1955. [77]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 81, inclusive, contain the original

Complaint;

Answer;

Judgment Barring the Taking of Evidence, etc.;

Notice of Appeal;

Affidavit for Order Extending Time to Docket Record;

Statement of Points Upon Which Appellant Intends to Rely;

Designation of Contents of Record;

Defendants' Designation of Additional Portions of the Record;

And a full, true and correct copy of the Minutes of the Court had on March 10, 1954; which together

with the Original copy of Reporter's Transcript of Proceedings of May 26, 1955 (also has No. 13197-BH), all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to $2.00, the sum of which has been paid by appellant.

Witness my hand and the seal of said District Court, this 15th day of November, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 14946. United States Court of Appeals for the Ninth Circuit. William Alfred Lucking, Appellant, vs. Ojai Mutual Water Company, a Corporation, and The Ojai Valley Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California Central Division.

Filed: November 16, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14946

WILLIAM ALFRED LUCKING,
Appellant,

vs.

OJAI MUTUAL WATER COMPANY, a Corporation, and THE OJAI VALLEY COMPANY, a Corporation,
Appellees.

ADOPTION OF STATEMENT OF POINTS AND DESIGNATION OF RECORD, PURSUANT TO RULE 17

Appellant above named hereby adopts the Statement of Points Upon Which Appellant William Alfred Lucking Intends to Rely on Appeal, commencing on Page 76 of the original certified record, and the Designation of Contents of Record on Appeal, commencing on Page 78 of the original certified record, heretofore filed with the Clerk of the United States District Court for the Southern District of California, Central Division, as compliance with Rule 17 of the Rules of Practice of United States Court of Appeals for the Ninth Circuit.

Dated: January 10, 1956.

/s/ WILLIAM ALFRED LUCKING,
In Propria Persona;

By /s/ WM. A. LUCKING, JR.,
Attorney-In-Fact.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 12, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION FOR CONSOLIDATION OF ACTIONS FOR PRINTING, BRIEFING AND HEARING

The above-entitled action and another action of the same title having been brought in the District Court of the United States for the Southern District of California, Central Division, and being Nos. 15804 and 13197, respectively, on the Clerk's register of actions of said District Court, and Nos. 14946 and 14945, respectively, on the Clerk's register of actions in the above-entitled Court, and said actions having been consolidated for trial in said District Court and having been tried therein on May 26, 1955, and the exhibits, testimony and other evidence adduced at the trial of said actions and the reporter's transcripts thereof being in many instances identical, and common questions of law and of fact being involved in said actions, and the nominal parties to said actions being the same, and both actions having been appealed to the above-entitled Court.

It Is Therefore Stipulated by and between appellant and appellees in the above-entitled appeals, through their respective counsel, that the above-entitled cases on appeal may be consolidated for printing, briefing and hearing so that duplication of printing may be eliminated, expenses reduced, and time of Court and counsel may be saved.

Dated: February 17, 1956.

/s/ WILLIAM ALFRED LUCKING,
In Propria Persona;

By /s/ WM. A. LUCKING, JR.,
Attorney-In-Fact.

/s/ JAMES C. HOLLINGSWORTH,
Attorney for Appellees.

So Ordered:

/s/ ALBERT LEE STEPHENS,
Acting Chief Judge, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed March 9, 1956.